

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HUI SUK JACOBS

Claimant

VS.

ARMOUR ECKRICH MEATS

Respondent

AND

INDEMNITY INS. CO. OF N.A.

Insurance Carrier

Docket No. 1,064,327

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 12, 2013, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders. Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant suffered an injury by repetitive trauma to her left shoulder on January 25, 2013. The prevailing factor for claimant's left shoulder injury was found to be claimant's job duties. Additionally, the ALJ found claimant's report of right shoulder pain and neck pain was not supported by the evidence as being work-related. The ALJ found claimant is entitled to medical care for the left shoulder and ordered respondent to provide claimant a list of two qualified physicians from which to choose a treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 1, 2013, Preliminary Hearing and the exhibits; the transcript of the April 17, 2013, discovery deposition of claimant; the transcript of the May 31, 2013, discovery deposition of James Quarles and the exhibits; the transcript of the May 31, 2013, discovery deposition of Tim Menke; and the transcript of the May 31, 2013, discovery deposition of Michael Johnson, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant did not sustain an accidental injury to either of the shoulders or the neck as a result of her employment with respondent, as there is no credible evidence stating otherwise. Additionally, respondent contends claimant did not sustain a repetitive trauma to the left shoulder as defined in K.S.A. 2012 Supp. 44-508(e) because claimant's degenerative issues to the left shoulder are the prevailing factor for her current injury. Further, respondent argues claimant failed to sustain her burden of proving she experienced an injury by repetitive trauma arising out of her employment. Respondent also claims claimant's left shoulder complaints are the natural and probable consequence of claimant's non-compensable right shoulder condition; therefore, claimant is not entitled to workers compensation benefits.

Claimant maintains the ALJ's Order should be affirmed regarding the finding granting claimant's request for medical treatment for a repetitive trauma left shoulder injury that arose out of and in the course of her employment with respondent. Moreover, claimant contends the ALJ's Order should be reversed related to claimant's right shoulder, as she suffered a repetitive trauma right shoulder injury arising out of and in the course of her employment with respondent and is entitled to medical treatment. Claimant maintains she may raise the right shoulder issue on appeal under K.S.A. 2012 Supp. 44-551(i)(1) as interpreted in *Borjas*.¹

The issues for the Board's review are:

- 1) Did claimant suffer an accident by repetitive trauma to her neck and both shoulders arising out of and in the course of employment with respondent?
- 2) Were claimant's work activities the prevailing factor causing her condition(s) and need for medical treatment?

FINDINGS OF FACT

Claimant has worked for respondent for over five years. In 2008, claimant became a machine operator,² a position that entailed operating a machine, replacing film, filling pockets, boxing, palletizing, relieving coworkers during break times, and supervising coworkers. Physical requirements of claimant's position included bending, lifting, stooping, pushing, pulling, standing, grasping, crouching, kneeling, and reaching. Respondent acknowledged that claimant's work is repetitive. Although claimant could not read English, she communicated well with her coworkers and completed the requisite paperwork her

¹ *Borjas v. Optimus Corp.*, No. 1,029,233, 2007 WL 2296141 (Kan. WCAB Jul. 31, 2007).

² Claimant's position has also been referred to as "primary operator" in the record.

position required. Respondent was unaware claimant could not read English. Respondent considered claimant an “awesome” employee.³

In August 2012, claimant testified she was filling pockets and replacing the film when she felt a sharp pain in her right shoulder and through her neck. The film is a large roll of plastic over-wrap that can weigh up to 149 pounds. This is loaded onto a cart which lifts the roll of film to the necessary height for replacement. Claimant testified she informed her lead operator, Sokhann, who then informed James Quarles, a supervisor. Claimant stated Mr. Quarles told her to take some aspirin when she asked to complete an accident report. Claimant completed her shift and worked the next day, when she again asked Mr. Quarles to complete an accident report. Claimant testified she was informed she could not file a report since it was no longer the same day of the incident. She was not sent to a doctor. Mr. Quarles testified he had no recollection of claimant asking him to complete an accident report two consecutive days. Further, he had no recollection of refusing to complete an accident report for claimant in August 2012.

Claimant continued to work her regular job, and in September 2012 began to experience pain in her left shoulder. She claimed the pain was due to overuse of the left shoulder compensating for right shoulder pain. Claimant testified she informed Mr. Quarles of her pain, and he then contacted his supervisor, Tim Menke, by telephone to ask if an accident report needed to be completed. Claimant testified she was advised to see her personal doctor as respondent could not give her treatment. Neither Mr. Quarles nor Mr. Menke had any recollection of this occurrence, and no accident report was filed. Claimant continued to work her regular job.

Michael Johnson, a packaging supervisor at respondent, testified he was aware claimant was having pain in her shoulder in October or November of 2012. He stated claimant said she was having some pain and wished to leave work, but at no time during that conversation did claimant ask to fill out an accident report or claim she injured herself at respondent. Mr. Johnson stated he informed Mr. Quarles of the conversation. To the best of Mr. Johnson’s knowledge, claimant continued to work her shift as usual and did not leave that day.

On September 10, 2012, claimant presented at Irwin Army Community Hospital with shoulder pain. The doctors at Irwin Army Community Hospital, specifically Major Kenneth Rivera, have been her personal doctors for the past 15 to 20 years. An x-ray of claimant’s right shoulder revealed modest degenerative joint disease with no fracture or dislocation. Claimant again presented at the hospital on September 17, 2012, where she was diagnosed with joint pain localized in the shoulder. Claimant was referred to physical therapy and given meloxicam. An MRI of the right shoulder was taken and revealed degenerative narrowing changes, evidence of chronic degenerative tears, impingement on

³ Quarles Depo. at 12.

the rotator cuff, and an anterior labrum tear. Claimant underwent an injection to the right shoulder on October 4, 2012. X-rays of her left shoulder taken on this date were shown to be unremarkable. Claimant was diagnosed by Major Rivera with left shoulder impingement syndrome and given an injection on October 29, 2012. He later diagnosed claimant with left shoulder impingement syndrome, possibly secondary to degenerative changes and SLAP tear, on December 19, 2012.

Claimant underwent an MRI of the left shoulder Irwin Army Community Hospital on January 23, 2013. The MRI revealed degenerative changes of the humeral glenoid relationship, anterior labral tear, partial tear of the supraspinatus and infraspinatus tendons with minimal fluid around the biceps tendon, and degenerative cystic changes of the humeral head.

An accident report filed January 25, 2013, indicated claimant suffered an injury to her left shoulder by “repetitive reaching [and] moving.”⁴ Mr. Quarles testified he was called via company radio to attend to claimant as she could barely move her left arm. Claimant and Mr. Quarles filled out the accident report, which indicated claimant suffered a sharp pain to the left shoulder while filling pockets. Mr. Quarles read each question to claimant and recorded her answers. Claimant signed the document upon completion. Mr. Quarles was unaware at the time claimant could not read English.

Claimant requested to see a doctor. Mr. Quarles told claimant he could not send her to a doctor as he does not “do those things.”⁵ Mr. Quarles does not have the authority to send an employee to the doctor. Respondent does not have a doctor onsite, although EMT personnel are available. Claimant was not seen by EMT staff at respondent, nor was claimant sent to a doctor for her injuries.

Following the completion of the accident report, an incident investigation meeting was scheduled with claimant, Mr. Quarles, and Kim Norris, respondent’s safety manager. Claimant did not attend this meeting, although Mr. Quarles stated she was reminded multiple times. Claimant did not reschedule the meeting.

Dr. Pedro Murati, a certified independent medical examiner, performed an independent medical evaluation of claimant at her counsel’s request on March 12, 2013. Claimant complained of pain in both shoulders going into the elbows and pain in her neck and upper back. After reviewing claimant’s medical history and performing a physical examination, Dr. Murati diagnosed claimant with bilateral rotator cuff tears and myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals. He further noted “claimant’s current diagnoses are within all reasonable

⁴ P.H. Trans., Cl. Ex. 1 at 1.

⁵ Quarles Depo. at 37.

medical probability a direct result from the work-related injury that occurred in a series from 08-20-12 and continuing during her employment with [respondent].”⁶

Dr. Murati placed claimant on restrictions, including no heavy grasping, no lifting above chest level, and no lifting, carrying, pushing, or pulling greater than 10 pounds bilaterally, with repetitive grasping to be limited to occasionally. For claimant’s bilateral rotator cuff tears, Dr. Murati recommended surgery. Dr. Murati recommended physical therapy, cortisone trigger point injections, and anti-inflammatory and pain medications for claimant’s myofascial pain syndrome.

Dr. Murati noted:

The claimant sustained multiple repetitive traumas at work which resulted in bilateral upper extremity, neck, and upper back pain She has no significant pre-existing injuries that would be related to her current diagnoses. She has significant clinical findings that have given her diagnoses consistent with her described multiple repetitive traumas at work. Therefore, it is under all reasonable medical certainty and probability, the prevailing factor in the development of her conditions is the multiple repetitive traumas at work.⁷

Claimant indicated to Dr. Murati she had no significant preexisting injuries to her neck, upper back, or bilateral shoulders prior to August 20, 2012. This assertion by Dr. Murati is inconsistent with the Irwin Army Community Hospital notes of January 3, 2010, which reflect that claimant was examined with complaints of left shoulder pain after having moved a box. She was released from care without restrictions and prescribed medication on the same date.

After Dr. Murati’s examination, claimant returned to Irwin April 2, 2013. At that time, no complaints of right shoulder were noted. The only complaints recorded on April 2, 2013, were of the left shoulder. Dr. Rivera diagnosed left shoulder impingement, left shoulder tendonitis and a left rotator cuff tear.

Additionally, claimant has a previous accident report filed with the Division on April 27, 2009, in which she reported an injury to the low back from palletizing boxes. Other accident reports filed with respondent include a cut to the right index finger in 2011, a laceration of the right foot in 2010, a smashed right thumb in 2010, and a contusion to the top of the right hand in 2010. Claimant did not fill these reports herself but did sign them upon completion.

⁶ P.H. Trans., Cl. Ex. 2 at 3.

⁷ *Id.* at 4.

Claimant's last day of work with respondent was March 30, 2013. She has not applied for FMLA or short-term disability benefits.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-534a(a)(2) states in part:

A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2012 Supp. 44-501b states in part:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(e) states in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

⁸ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ANALYSIS

This Board Member agrees with the conclusions of the ALJ. Claimant testified regarding the development of pain in her left shoulder, which she related to compensating for right shoulder pain. Dr. Murati wrote in his report that claimant had bilateral rotator cuff tears. This diagnosis is confirmed for the left shoulder only in Major Rivera's April 2, 2013 clinical note.¹⁰

The medical records from Irwin Emergency Medical Clinic and the Irwin Orthopedic Clinic¹¹ support a worsening of her left shoulder condition. The only medical opinion regarding prevailing factor is from Dr. Murati. Dr. Murati stated that the repetitive traumas at work were the prevailing factor in all of claimant's alleged conditions. As this opinion relates to the left shoulder, this Board Member finds Dr. Murati's opinion credible and supported by the medical records.

With regard to the right shoulder, the only medical evidence of an injury to claimant's neck and right shoulder are the opinions of Dr. Murati. Dr. Murati's opinions in this regard are not supported by the Irwin records and are given no weight.

CONCLUSION

Claimant has proven by a preponderance of the evidence that she suffered an injury to her left shoulder arising out of and in the course of her employment with respondent and that her work activities are the prevailing factor causing her condition and need for medical treatment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated August 12, 2013, is affirmed.

IT IS SO ORDERED.

⁹ K.S.A. 2012 Supp. 44-555c(k).

¹⁰ P.H. Trans., Resp. Ex. A at 2.

¹¹ P.H. Trans., Resp. Ex. A & B.

Dated this _____ day of October, 2013.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge